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# In the Supreme Court of the United States

OCTOBER TERM, 1924

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UNITED STATES OF AMERICA	} No. 111
v.	
JAMES J. JOHNSTON	

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF ON BEHALF OF THE UNITED STATES

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### STATEMENT OF THE CASE

The defendant, James J. Johnston, was convicted in the United States District Court for the Southern District of New York under an indictment which charged violation of section 47 of the Penal Code (embezzlement) and violation of sections 800, 802, and 1308 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120, 1143). The charges arose out of the failure of the defendant to account for or to pay entertainment admission taxes, under circumstances set forth in detail below.

On writ of error, the Circuit Court of Appeals for the Second Circuit reversed the conviction and ordered the indictment to be dismissed. The opinion of the Circuit Court of Appeals is reported in 290 Fed. 120, and appears also at R. pp. 85-88. A petition for rehearing was denied. The United States then petitioned this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, on the ground that the questions involved were of importance to the administration of the revenue laws, and that the decision below defeated the plain purpose of the statute and opened the door to fraudulent transactions. This Court, on October 8, 1923, granted the writ of certiorari, 263 U. S. 692.

The charges upon which the defendant was tried arose out of his failure to account for, or to pay, entertainment taxes upon boxing contests which were conducted by him at the Manhattan Casino in New York City. The indictment (R. pp. 2-8) contains twelve counts, upon all of which the defendant was found guilty. Count 1 charges a *willful refusal to pay over* to the Government the sum of \$618, which was the amount of entertainment tax due on a boxing contest held in the month of February, 1921. Count 2 charges a *failure to make a return* to the Collector of Internal Revenue of the money collected for admissions to this same contest. Count 3 charges an *embezzlement* of the same sum of \$618, "which was then and there money of the United States."

Counts 4-6 repeat the same three charges with respect to boxing contests held during March; counts 7-9, with respect to contests in April; and counts 10-12, with respect to contests in May. The indictment thus covers a period of four months in 1921. The aggregate value of the tickets disposed of during this period amounted to \$64,039.90. The entertainment tax of 10%, plus penalties for delay, amounted to \$8,324.84. Aside from one part payment of \$250, none of this tax was ever paid to the Collector (R. p. 43); nor was any return made to him.

The Government's evidence was uncontradicted. It showed that boxing exhibitions were conducted by the defendant under a license issued by the State Athletic Commission to the *Central Manhattan Boxing Club, Inc.*, a corporation organized under the laws of New York. (R. pp. 47, 74.) Under the law of that State, licenses were required for the holding of boxing contests; these could be issued only to domestic corporations, and not to individuals. (R. p. 30) N. Y. Laws, 1920, c. 912; printed *infra* as an Appendix, p. 32. It was solely for the purpose of compliance with this law that the Central Manhattan Boxing Club was formed. (R. p. 11.) The defendant Johnston paid the expenses of incorporating it. He also paid the cost of the boxing license, amounting to \$750, and of the bond, amounting to \$50. (R. p. 15.) The club took an assignment of a lease of the Man-

hattan Casino (R. pp. 78-79), a large hall, where the contests in question were subsequently held.

The defendant, Johnston, entered into a contract with the Club (R. pp. 47-49) whereby he undertook "*to exclusively conduct boxing contests*" as its "*agent, matchmaker, and manager.*" He agreed to pay the Club a fixed minimum rent of \$750 per month for the use of the Casino, except in July and August, when the rent was to be \$500 per month. This minimum rent was to be paid in case no boxing contest, or one contest only, should be held during the month. For each additional contest beyond one per month, Johnston was to pay \$500 to the Club. *Johnston further agreed to pay the State and Federal entertainment taxes.* He agreed to reimburse the Club for all penalties imposed by the State boxing commission. He agreed to pay all ticket takers, ticket sellers, ushers, referees, and other officials; and in every contract with these employees was to be inserted a clause that Johnston was solely responsible for their wages. The contract further provided:

*The party of the second part [Johnston] is to have entire charge of the handling and selling of all tickets and shall have exclusive control of all complimentary and press tickets. (R. p. 49.)*

It was under this contract that the defendant conducted the boxing contests set forth in the indictment; and under this contract he was allowed and assumed full control. (R. p. 25.) He paid

the rent of the Casino as agreed. (R. p. 15.) He received all the mail directed to the Club. (R. p. 19.) He managed all the bouts. (R. p. 19.) He took possession of the Club's boxing license, under which he acted, and refused to surrender it when demand was made. (R. p. 20.) On one occasion, when the Casino was used for a charity performance, he permitted a third party to use the license, and was paid \$500 for the permission. (R. p. 16.)

The defendant appointed as his assistant one Joseph M. O'Brien, who assumed (without any authority from the directors) the title of Assistant Treasurer of the Club. (R. pp. 18, 25.) O'Brien paid all the employees. (R. p. 15.) The reports which were required by the State Boxing Commission from all license holders were signed by O'Brien or by the defendant himself, and not by any officer of the Club, which was the nominal holder of the license. (R. pp. 21-23; Govt. Exhibits 3, 6, 8, 9, 11, 13, 15, 17; R. pp. 50, 54, 56, 58, 61, 65, 67, 70.)

The State entertainment tax of 5% on admissions was likewise paid, and the tax reports submitted to the State Treasurer, by O'Brien, in his assumed capacity of Assistant Treasurer of the Club. (Govt. Exhibits 5, 7, 10, 12, 14, 16, 18; R. pp. 52, 55, 60, 63, 66, 69, 72.)

In only one case was the report made by an officer of the Club. (Govt. Exhibit 4, R. p. 51.) The Federal tax remained unpaid. (R. p. 41.)

The defendant did not take the stand in his own behalf, nor did he call any witnesses. A verdict of

guilty was recorded upon all twelve counts of the indictment, with a recommendation of mercy; and the defendant was sentenced to pay a fine of \$500 and to be imprisoned for sixty days.

On writ of error, before the Circuit Court of Appeals, it was contended that the defendant could not be held liable for the tax, because under State law *the Club alone* (and not the defendant) was licensed to conduct the boxing contests on which the tax was due. It was further contended that no conviction could be had for embezzlement on counts 3, 6, 9, and 12, for the reason that entertainment taxes are not "moneys of the United States" until they have actually been paid over to the Collector of Internal Revenue. Both of these contentions were accepted by the Circuit Court of Appeals.

It will be seen, therefore, that this case involves two principal questions:

1. Whether a corporation (the Central Manhattan Boxing Club), *because it holds a State license*, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person (Johnston) receiving payment for admissions to collect the taxes and account for and pay them over to the Government.

2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.

In connection with question 2, there arises a subordinate question, set forth in the Government's petition for certiorari, namely—

3. Whether the Circuit Court of Appeals erred in holding that certain statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

Besides the three questions set forth above, there are other assignments of error which were argued on behalf of the defendant in the Circuit Court of Appeals, but which were not made the ground of decision in that Court. These will be briefly considered herein, after the principal questions have been discussed.

#### STATUTES INVOLVED

In Title VIII of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120), are to be found the following provisions:

SEC. 800 (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by Section 700 of the Revenue Act of 1917—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission. ✓

SEC. 802. That every person (a) receiving any payments for such admission, dues, or

fees shall collect the amount of the tax imposed by Section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in Section 502.

Section 502 of this Act is included in Title V (40 Stat. 1057, 1103). It provides:

X SEC. 502. That each person receiving any payments referred to in section 500 [transportation taxes] shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

\* \* \* \* \*

The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Section 1308 of the same Act is included in Title XIII (40 Stat. 1057, 1143). It provides:

SEC. 1308 (a). That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, *who fails to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than \$1,000.* [Italics ours.] ✓

Counts 2, 5, 8, and 11 of the indictment, charging a *failure to make returns*, are based upon this subsection.

✓ SEC. 1308(b). Any person who *willfully refuses to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or*

✓ times required by law or regulation, or who willfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution. [Italics ours.]

Counts 1, 4, 7, and 10 of the indictment, charging a *willful refusal to pay* the tax, are based upon this subsection.

SEC. 1308 (d). The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Section 1309 of the same Act (40 Stat. 1057, 1143) provides:

That the Commissioner, *with the approval of the Secretary*, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act. [Italics ours.]

Section 47 of the Penal Code provides:

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Counts 3, 6, 9, and 12 of the indictment, charging an embezzlement of the tax moneys, are based upon this section.

It should be noted further that under the power conferred by section 1309, *supra*, the Treasury Department promulgated a regulation requiring the return to be filed and the tax to be paid on or before the *last day of the month following* that in which the entertainments were held. Treasury Department, Internal Revenue Regulations 43, part 1, Art. 63, p. 97, approved January 26, 1921.

#### ARGUMENT

##### I

This Court has jurisdiction to grant certiorari at the suit of the Government in a criminal case.

It is not necessary to argue this proposition at length, as it is presumed that the Court considered the matter when it passed upon the petition for certiorari in 263 U. S. 692, and when it granted a similar petition at the suit of the Government in *United States v. Gulf Refining Co.*, 262 U. S. 738. It is sufficient to submit that the former holding of this Court in *United States v. Dickinson*, 213 U. S. 92, is not now an authority to the contrary, in view of the significant changes which have been made in the statute since that case was decided. Under Section 240 of the Judicial Code, as it now stands, this Court may grant certiorari in any case, *civil or criminal, upon the petition of any party*, including the United States. (Act of March 3, 1911,

c. 231, s. 240, 36 Stat. 1087, 1157, amending the Act of March 3, 1891, c. 517, s. 6, 26 Stat. 826, 828.)

An examination of the committee reports, and of the statements made by committee members upon the floor of the Senate, clearly shows that the framers of that section of the Judicial Code intended that the United States should be permitted to bring up criminal cases from the Circuit Courts of Appeals by certiorari. The section was, in fact, amended during its passage through the Senate, in order to accomplish that result. Congressional Record (61st Congress, 3rd Session), vol. 46, part 3, p. 2134; vol. 46, part 4, pp. 3762, 4000, 4001.

## II

Coming now to the merits of the case, the Government submits that the Circuit Court of Appeals was in error when it held that the Central Manhattan Boxing Club, Inc., and not the defendant Johnston, was liable for the payment of the taxes in question.

The relationship between the Club and Johnston was fully brought out at the trial, and has been set forth at length above at pp. 3-5. It is very clear that the Club was formed and the license procured at Johnston's request, at Johnston's expense, and for Johnston's benefit. The sole reason for its existence is to be found in the provision of the State laws which permitted only *incorporated* clubs to hold boxing licenses. (R. pp. 11, 15, 30.) The whole device was merely a subterfuge to permit Johnston to do indirectly through the medium of a

corporation what the State law prevented him from doing directly as an individual. If he goes further and seeks also to use the corporate entity as a device for evading payment of the Federal tax, he can none the less be punished. One may be liable criminally for acts done under the cloak of corporate existence, even though the corporation is a separate entity.

*United States v. Lehigh Valley Railroad Co.*, 220 U. S. 257, 274.

*In re Rieger, Kapner and Altmark*, 157 Fed. 609.

*Wood v. United States*, 204 Fed. 55, 58.

In this case, however, it is submitted that the acts charged in the indictment were from beginning to end the direct acts of the defendant Johnston alone. The contract between the Club and Johnston (R. pp. 47-49) was in reality nothing more nor less than a lease to the defendant of the Manhattan Casino for a specified cash rent, and was so understood by all parties. (R. pp. 19-20.) Johnston, as lessee, controlled all the arrangements for the contests, sold the tickets, and collected the tax. (R. p. 25.)

Johnston had agreed with the Club that he would pay both State and Federal taxes. (R. p. 48.) His assistant, O'Brien, actually did pay the State tax in full (*supra*, p. 5), submitting over his signature the reports required by the State Treasurer. But neither he nor anyone else took any steps toward paying over the Federal tax to the Collector of Internal Revenue.

Yet in spite of all these facts, the Circuit Court of Appeals reached the conclusion that Johnston could not be held liable for the *Federal* tax, because the *State* law recognized the Club alone as the holder of the license.

It is submitted that this conclusion in effect renders the Federal taxing power subordinate to the legislation of the State, and contravenes the plain purpose of the statute. The Revenue Act of 1918 (Act of February 24, 1919, c. 18, ss. 800, 802, 40 Stat. 1057, 1120), requires that the tax shall be *paid by the spectators and collected by the person who receives the payments from the spectators*, *supra*, p. 7. The Act looks to the person who is in actual control of the admissions. Through him, or through his box-office assistants, the Federal Government collects the tax from spectators. From him it requires an accounting to be made to the Collector of Internal Revenue. To say that he is excused from making that accounting because, under State law, he had no license to conduct the entertainment, is manifestly absurd. The Club in this case never received any part of the admission charges as such. It was not entitled to receive them. It received only a monthly rent in cash from Johnston for the use of the Casino. Johnston or his assistants collected the admissions and paid the State tax; Johnston should likewise have been held liable to account for the Federal tax.

There is an authoritative ruling of the Treasury Department, approved by the Secretary, which, it

is submitted, covers such cases, and is to be supported alike by sound sense and by the language of Section 802 of the Revenue Act of 1918.

Whenever a theater, hall, park, ballroom, or other place is leased for any occasion, there is imposed on the lessee, by the provisions of the Act, the duty of collecting any taxes due on admissions to such place on that occasion.

\* \* \* \* \*

Where a person, society, or organization acquires the right to dispose of all the admissions to any place for one or more occasions the transaction amounts to a lease of such place within the meaning of this Article.

[Treasury Department, Internal Revenue Regulations 43, part 1, Art. 64, page 98, approved January 26, 1921, by the Secretary of the Treasury, under the powers conferred by section 1309 of the Revenue Act of 1918.]

In the present case, the defendant Johnston had *acquired the sole right* to dispose of all admissions to the Manhattan Casino. (R. p. 49.) The arrangement was clearly a lease as contemplated by the ruling above quoted; and Johnston was the person receiving box-office payments. He was, therefore, the person to whom the Act looked for an accounting of the tax moneys.

### III

Even if it be held that the Club was also liable for the tax, the defendant Johnston was none the less properly convicted.

The relevant sections of the Revenue Act of 1918 have been set forth above, pp. 7-10. Their effect can be briefly summarized. By sections 1308(a) and 1308(b), penalties are imposed upon any "*person*" who fails to make returns, or who willfully refuses to pay the tax. By section 1308(d), the term "*person*" is made to include any "*officer or employee of a corporation*" who, as such officer or employee, is under a duty to make the return or to pay the tax.

Reasons have been given above in point II to show that Johnston was the lessee of the Casino, where the contests were held, that he had entire control of the Club's activities so far as the contests were concerned, and that he collected all admissions for his own exclusive profit. The finding of the jury shows that this is the true view of the facts.

But even if it is not true, only one alternative remains. If Johnston was not solely liable on his own account, then he was liable as the "*agent, matchmaker, and manager*" of the Club. On this alternative theory, section 1308(d) of the Act would apply. If not an "*officer*" of the Club, Johnston was at least an "*employee*" within the meaning of section 1308(d); and he was under a duty imposed by written contract to make the returns and to pay the tax. In this view of the facts, it matters not that the Club might have been held liable for the tax or that the Club might also have been in-

dicted. The defendant Johnston, being the "employee" whose duty it was to pay the tax, may be indicted for failure to do so, regardless of any additional remedy which the United States might have against the Club.

Even assuming that the Club failed to account for the taxes, it was not necessary to charge that Johnston had aided or abetted in the failure. Under section 1308 (d), and section 332 of the Penal Code, he could be charged as a principal.

*Harriett v. United States*, 273 Fed. 785, 790 (certiorari denied, 257 U. S. 646).

*Kelly v. United States*, 258 Fed. 392, 401 (certiorari denied, 249 U. S. 616).

*Vane v. United States*, 254 Fed. 32.

It is submitted, however, that in no event was the Club liable to pay the tax, for the Club did not collect the admissions and was not entitled to receive them. But whether the Club is liable or not, the defendant Johnston is.

#### IV

The opinion of the Circuit Court of Appeals is based chiefly upon the provisions of the New York State law with regard to boxing licenses, to which allusion has already been made.

It is manifest that the State law can not control the decision of this case. The question as to the right of Johnston, under State law, to conduct boxing contests, is altogether irrelevant. The fact re-

mains that he did conduct them; and that fact alone suffices to render him liable for failure to pay the Federal tax.

The agencies of the Federal Government, and particularly its agencies of taxation, are not subject to State control; nor is the scope of their duty to be interpreted by State laws.

*McCulloch v. Maryland*, 4 Wheat. 316, 431.  
*License Tax Cases*, 5 Wall. 462, 473.

The Revenue Act of 1918, as has been seen, places the duty of collecting the tax upon the person who collects the admission charges. It matters not that some one else, under State law, should have collected them.

It is said that the enterprise was that of the Club alone. The agreement of the parties, the evidence, and the finding of the jury are not in accordance with that conclusion. The Club was the instrument of Johnston to accomplish his desire and yet to keep within the letter of the State law. Whether the Club in fact rented its license to Johnston in violation of the State law is no concern of the Federal Government. Johnston alone collected the admissions. Johnston alone, under his agreement with the Club, had the right to collect those admissions. And having collected them, Johnston is the person to whom the Federal Government is entitled to look for payment of the tax.

The absurdity of resorting to State laws for the purpose of construing or limiting the Federal tax-

ing power is well shown by the language of this Court in the *License Tax Cases*, 5 Wall. 462, 473:

There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union. \* \* \*

\* \* \* The remaining question is, whether the defendant, indicted for carrying on a business on which a special tax is imposed by the internal revenue law, but which is prohibited by the laws of New York, can be convicted and condemned to pay the penalty imposed for not having paid that tax.

What has been already said sufficiently indicates our judgment upon this question.

## V

We come now to the consideration of the second main point involved in the decision of the Circuit Court of Appeals. Counts 3, 6, 9, and 12 of the indictment charge an *embezzlement* of the tax moneys by Johnston. The Circuit Court of Appeals held that the tax moneys never became the moneys of the United States, and therefore could not be embezzled. This holding was based upon the theory that the person collecting an admission

tax is a debtor to the United States, and that property in the tax moneys does not pass to the Government until those moneys are actually paid to the Collector of Internal Revenue.

It is submitted that this theory is incorrect. A collector of tax moneys is not a debtor to the United States; he is a bailee.

*United States v. Thomas*, 15 Wall. 337, 352.

The Revenue Act of 1918 imposes upon the person receiving admissions the duty of collecting the tax from the spectators. The amount of that tax is kept separate from the price of admission; and the regulations of the Treasury Department (made in pursuance of section 1309 of the Act) require that the price of admission, the amount of the tax, and the total of admission plus tax be printed *as separate items* on every ticket sold. Treasury Department, Internal Revenue Regulations 43, part 1 (approved January 26, 1921), Art. 51, p. 82.

It is submitted that the clear purpose of both the law and the regulations is to impose upon the person collecting admissions the capacity *quoad haec* of a Government agent. He is the instrumentality through which the United States takes in the tax directly from the spectators. He is, so far as those taxes are concerned, in the position of a Government collector, like the Collector of Internal Revenue himself. And since this is the case,

it necessarily follows that the tax moneys become the property of the United States the instant they are paid at the box office.

The tax is imposed by section 800 of the act upon the *spectator*. His duty is discharged when he pays it at the door of the theater or other place of entertainment. If the person who collects the admissions fails to account to the Government for the tax, it would be absurd to hold that the spectator must pay it a second time.

The case is not analogous to that of income taxes or other taxes of that nature. Obviously, it can not be argued that the individual citizen who pays an income tax is a collector for the Government. He is not a bailee of the United States; he is a debtor for the amount of the tax; and nothing short of payment will discharge him. The tax, until paid, remains a part of his general property, and does not belong to the United States. But the collector of entertainment taxes stands upon a different footing. The tax is not upon him; it is upon the spectator. His duty is to collect the tax from the spectator. He collects it, and it comes lawfully into his possession, as the agent of the United States; and if he converts it to his own use, he commits the crime of embezzlement.

*Grin v. Shine*, 187 U. S. 181.

*United States v. U. S. Brokerage and Trading Co.*, 262 Fed. 459.

*Schell v. United States*, 261 Fed. 593.

## VI

The Circuit Court of Appeals, however, reached a contrary view, largely in reliance upon a ruling of the Bureau of Internal Revenue in 1922, based upon the Revenue Act of 1921 (Act of November 23, 1921, c. 136, s. 800, 42 Stat. 227, 289).

That ruling is reported in the Internal Revenue Bulletin, volume 1, No. 25 (June 19, 1922), at page 18. It arose from a case where theatre admission taxes to the amount of \$112.15, included in a larger amount of money, were stolen from the safe of the theatre owner. The owner inquired whether the taxes thus stolen had become the property of the Government so as to relieve him from payment of the tax. The Bureau decided that his obligation to the Government was not complied with until the tax was actually paid; and that accordingly the \$112.15 collected as admission tax was not the property of the Government at the time it was stolen.

The Circuit Court of Appeals seems to have treated this decision as authoritative. For although the Court said that it did not "amount to a regulation," it referred to it in the following language:

Treasury decisions such as are regulations of a department of the Government addressed to and reasonably adapted to the enforcement of an act of the Congress, the administration of which is confided to such department, have the force and effect of law if they be not in conflict with express statutory provisions. [290 Fed. 120, 123.]

It is submitted that this decision, whatever may be its merit, is not a regulation having the force of law; and it is further submitted that in any event it can not be supported by the statute.

In the first place, it must be noted that upon the cover of the Bulletin in which the decision is reported there appear the words:

The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Revenue Acts; *they have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.* Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case. As bearing out this distinction, it may be observed that the rulings published from time to time may appear to reverse rulings previously published. [Italics ours.]

The decision in question clearly is not an authoritative Treasury regulation made in pursuance of the statute. It does not bind either the Department or the Courts. And if the reasoning given above under point V is sound, then this decision represents an erroneous view of the law.

It is a manifest hardship, and it is not the purpose of the Act, to impose upon the collector of entertainment taxes the obligation of a debtor, who is bound at all events to pay. It is submitted that a sound interpretation of the law would hold him liable as a special bailee.

*United States v. Thomas*, 15 Wall. 337.

If the defendant Johnston is viewed as a special collector (and it is submitted that this view is the true one), then he is a bailee of the tax money; and his possession is in its inception lawful. He is bound to keep the tax moneys separate from his own private funds. If he intermingles the two, and converts the whole to his own use, he is properly charged with embezzlement.

*Moore v. United States*, 160 U. S. 268.

Nor does it matter that the defendant collected, at the same time, both the tax moneys and the admission charges, and that he was entitled to retain the admission charges as his own. The right of the defendant to retain part of the sum is irrelevant to the question whether he has committed embezzlement of the whole or of another part.

*United States v. U. S. Brokerage and Trading Co.*, 262 Fed. 459.

## VII

In any event, however, the conviction and sentence in the present case may be supported, regardless of the counts which charge embezzlement. The defendant was found guilty upon all twelve counts of the indictment. He was sentenced to \$500 fine and sixty days' imprisonment. The fine is of an amount which may be supported under any one of the counts. The prison sentence may be supported under any of the counts except 2, 5, 8, and 11, which authorize only a fine. Hence, even should this Court decide that the tax moneys were not moneys of the United States, and that the embezzlement counts (3, 6, 9, and 12) cannot, therefore, be supported, the fine is still good under counts 1, 2, 4, 5, 7, 8, 10, and 11, or any of them; and the prison sentence is good under counts 1, 4, 7, and 10, or any of them. So, if any of these counts is good, and is supported by sufficient evidence, the conviction will stand.

*Abrams v. United States* 250 U. S. 616, 619.

*Claassen v. United States*, 142 U. S. 140,  
147.

## VIII

Finally there remain certain assignments of error which were relied upon by the defendant in the Circuit Court of Appeals, but upon which that Court did not rely as the grounds of its decision. These may be briefly noticed.

A. The defendant contended that it was error to permit the witness Hayden to testify over objections. (R. pp. 10-25.) Hayden was an attorney.

It was contended that his testimony was based upon confidential communications from the defendant, who, it is argued, was his client at the time.

This contention cannot be supported by the facts. At the time when Johnston entered into the contract with the Club (R. pp. 47-49), as well as during the period covered by the indictment, Hayden was not acting as Johnston's attorney. (R. pp. 10, 16.) His only connection with the matter appears to have been based upon his interest in the Club, in the organization of which he had assisted. His knowledge was gained, not as an attorney (least of all as Johnston's attorney), but as a financial supporter of boxing contests. So far as he acted in his capacity of attorney, he seems to have acted for himself, for the owners of the Manhattan Casino, and for the directors of the Club. Moreover, no *confidential* communications ever appear to have been made to him by Johnston. Even if it be held that Johnston was his client, still a large part of his information was not derived from Johnston. And what he did learn from Johnston was communicated to him in the presence or with the knowledge of other persons—directors of the Club, witnesses to the contract, etc. In such cases, even assuming that the parties are attorney and client, the communication is not privileged.

*Laflin v. Herrington*, 1 Black. 326, 339.

*York v. United States*, 224 Fed. 88.

*Thompson v. Cashman*, 181 Mass. 36.

*People v. Andre*, 153 Mich. 531, 540.

*Matter of King v. Ashley*, 179 N. Y. 281.

*Doheny v. Lacy*, 168 N. Y. 213, 223.

*People v. Buchanan*, 145 N. Y. 1, 25.

It is submitted, therefore, that under these circumstances no prejudicial error was committed in permitting Hayden to testify.

B. The defendant contends that the embezzlement counts are fatally defective because they fail to employ the word "*feloniously*."

These counts (3, 6, 9, and 12) are identical in language, except as to amounts and dates. Each count charges that the defendant "unlawfully, knowingly, and willfully embezzled the sum of \_\_\_\_\_, which was then and there money of the United States, in the following manner, to wit \* \* \*." There then follows a description of the manner in which the money came into the hands of the defendant. The indictment then alleges that he collected it—

under the provisions of said revenue act of 1918 for and on behalf of the United States, and it was the duty of the defendant to account for the said sum to the United States, and the defendant unlawfully, knowingly, and willfully failed to pay the said sum to the United States and converted the same to his own use.

This language clearly apprises the defendant of the charge which he was called upon to meet. - It contains every ingredient required to charge the crime of embezzlement under section 47 of the Penal Code.

*Grin v. Shine*, 187 U. S. 181.

*Claassen v. United States*, 142 U. S. 140, 146.

*United States v. Harper*, 33 Fed. 471.

The words "unlawfully, knowingly, and willfully" are sufficient to show the criminal intent. There is no need to add "feloniously."

*Bannon and Mulkey v. United States*, 156 U. S. 464.

*United States v. Staats*, 8 How. 41.

Even if the omission of the word "*feloniously*" is error, it is not fatal error under section 1025 of the Revised Statutes; nor is it prejudicial error under section 269 of the Judicial Code as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181.

*Frisbie v. United States*, 157 U. S. 160.

The use of that word may have had, at one time, a proper meaning; but at the present date it has no practical purpose; and its omission can not prejudice the defendant.

As the Supreme Court of New Hampshire said in *State v. Felch*, 58 N. H. 1, 2:

What would "*feloniously*" mean in this indictment? Would it inform the defendant that, in England, felony was formerly punished by forfeiture, and, generally by death? An indictment is an accusation, and not historical instruction. Would it inform him that New Hampshire punishes his crime either by death or state prison? That would be a statement of law, deficient in certainty; and an indictment is a statement, not of law, but of fact. 1 Bishop Cr. Pro., ss. 52, 53, 274, 275. Would it charge him with knowledge of the burglary, or an intent to assist the burglar in escaping punishment? That

knowledge and that intent are fully and plainly, substantially and formally, charged in other and appropriate words. Would it signify that his knowledge, his intent, or his act, was felonious? That would be a hint concerning the penalty; and the penalty, being matter of law, need not be suggested. Would it signify that his knowledge, his intent, or his act, was criminal? That would be an unnecessary averment of law. Would it be a memorial of the general confederacy among English prosecutors, witnesses, juries, judges, and ministers of the crown, in favor of life, to prevent the enforcement of a code of two hundred capital crimes? 2 Paterson Liberty of the Subject, 309, 310. It is not necessary that the grand jury should thus remind the accused or the court that there is no legal or moral ground on which such a confederacy can survive the reason and object of its existence. *Darling v. Westmoreland*, 52 N. H. 401, 407, 408.

C. It was also argued below that counts 1, 2, 4, 5, 7, 8, 10, and 11 were defective in that they failed to describe the offense with sufficient particularity.

Counts 1, 4, 7, and 10 are based upon section 1308(b) of the Revenue Act of 1918, and charge a *willful* refusal to pay the tax. Counts 2, 5, 8, and 11 are based upon section 1308(a), and charge a *non-willful* failure to make tax returns.

It is sufficient to invite the attention of the Court to a comparison of these counts with the statutes under which they are drawn. Every element of the

offense, as set forth in the statute, is minutely charged in each count. The dates of the contests, the amounts of the tax due, the duty of the defendant as a person required to collect the taxes and to make returns, and his failure to account or to make returns, are all set forth. The defendant was given ample notice of every item of the charges which he was required to meet. No demurrer or motion to quash was interposed by the defendant before trial; nor did he request a bill of particulars. He can not attack the indictment now.

*Revised Statutes, 1025.*

Judicial Code, s. 269, as amended by the Act of February 26, 1919, c. 48 (40 Stat. 1181).

*Holmgren v. United States, 217 U. S. 509.*

*Armour Packing Co. v. United States, 209 U. S. 56.*

## IX

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed; and the judgment of conviction should be affirmed.

JAMES M. BECK,

*Solicitor General.*

WILLIAM J. DONOVAN,

*Assistant to the Attorney General.*

APRIL, 1925.

## APPENDIX

Laws of the State of New York, 143rd Session, 1920, Chapter 912 (N. Y. Laws, 1920, vol. 3, page 2333).

*An Act* Allowing and regulating boxing and sparring matches, and establishing a state boxing commission, and making an appropriation therefor.

Became a law May 24, 1920, with the approval of the Governor. Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. State boxing commission established; terms; salaries; offices; organization. The governor shall appoint three persons, who shall constitute a state boxing commission. One of such commissioners shall hold office for a term to expire January first, nineteen hundred and twenty-two, one for a term to expire January first, nineteen hundred and twenty-three, and one for a term to expire January first, nineteen hundred and twenty-four. Their successors shall be appointed for a term of two years. Each member of the commission shall receive an annual salary of not to exceed five thousand dollars, and his actual and necessary traveling and other expenses incurred by him in the performance of his official duties. The commission shall maintain in the city of New York general offices for the transaction of its business. The members of the commission shall, at their first meeting after their appointment, elect one of their number chairman of the commission, shall adopt a seal for the com-

mission, and make such rules for the administration of their office, not inconsistent herewith, as they may deem expedient; and they may thereafter amend or abrogate such rules. Two of the members of the commission shall constitute a quorum to do business; and the concurrence of at least two commissioners shall be necessary to render a determination by the commission.

SEC. 2. Deputies; secretary; salaries and expenses; report to legislature. The commission may appoint and at pleasure remove not to exceed four deputies who shall be paid a per diem compensation of not to exceed twenty-five dollars for each day actually engaged in the discharge of their duties and all necessary expenses for traveling and maintenance during actual engagement. The commission shall direct a deputy to be present at each place where sparring or boxing matches are to be held pursuant to the provisions of this act. Such deputy shall ascertain the exact conditions surrounding such match or contest and make a written report of the same in the manner and form prescribed by the commission. The commission may appoint, and at pleasure remove, a secretary to the commission, whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents and papers, prepare for service such notices and other papers as may be required of him by the commission and perform such other duties as the commission may prescribe. The commission may employ such clerical employees as may be actually necessary and fix their salaries within the amount appropriated therefor by the legislature. The secretary of the commission shall receive an annual salary of not

to exceed three thousand dollars. The salaries, necessary traveling and other necessary expenses of the members of the commission, and the salary of its deputies and secretary, shall be paid monthly by the state treasurer on the warrant of the state comptroller and the certificate of the chairman of the commission out of the money appropriated to be used therefor. Such matches or contests may be held in any building for which the committee in its discretion may issue a license. Where such match or contest is authorized to be held in state or city owned armory the provisions of the military law in respect thereto must be complied with. But no such match or contest shall be held in a building partly used for dwelling purposes or for religious services; except that a keeper or caretaker and his family may reside in such building. The commission shall annually make to the legislature a full report of its proceedings for the year ending with the first day of the preceding December and may submit, with such report, such recommendations pertaining to its affairs as to which it shall seem desirable.

SEC. 3. Boxing exhibitions authorized; jurisdiction of commission; permits to corporations. Boxing and sparring matches or exhibitions for prizes or purses, or where an admission fee is received, are hereby allowed except on Sundays. The commission shall have and hereby is vested with the sole direction, management, control and jurisdiction over all such boxing and sparring matches or exhibitions to be conducted, held or given within the state of New York, and no such boxing or sparring match or exhibition shall be conducted, held or given

within the state except in accordance with the provisions of this act. The commission shall issue under its hand and seal, annual permits in writing for holding such boxing and sparring matches, *but only to corporations thereunto duly licensed*, as hereinafter provided, which said permits may be revoked upon violation of any of the provisions hereof, or any rule, regulation or order of the commission. [Italics ours.]

SEC. 4. License committee; terms; secretary; salary of secretary. The governor shall appoint and at pleasure remove a license committee, consisting of three persons, who shall hold office until their successors are appointed. Each member of the committee shall serve without compensation. The committee may appoint, and at pleasure remove, a secretary to the license committee, whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents, and papers, prepare for service such notices and other papers as may be required of him by the committee and generally to perform such other duties as the committee may prescribe. The secretary of the license committee shall receive an annual salary of not to exceed three thousand dollars, which shall be paid in like manner as the salaries and expenses of the commission. Such committee shall appoint such clerical employees as may be actually necessary and fix their salaries within the amount appropriated therefor by the legislature.

SEC. 5. Offices of committee; organization; rules; quorum. The committee shall maintain a general office in the city of New York, for the transaction of its business. The members of this license com-

mittee shall, at their first meeting after their appointment, elect one of their number chairman of the committee, shall adopt a seal for the committee and make such rules for the administration of their office, not inconsistent herewith, as they may deem expedient, and they may hereafter amend or abrogate such rules. A majority of the members of the committee shall constitute a quorum to do business, and the concurrence of a majority of such quorum shall be necessary to render a determination by the license committee.

SEC. 6. Jurisdiction of committee. The license committee is hereby given the sole control, authority, and jurisdiction over all licenses to hold boxing and sparring matches or exhibitions for prizes or purses or where an admission fee is received, and over all licenses to any and all persons who participate in such boxing or sparring matches or exhibitions, as hereinafter provided.

SEC. 7. License to corporations. The license committee may, in its discretion, issue a license to conduct, hold, or give boxing or sparring matches or exhibitions, subject to the provisions hereof, *to any corporation duly incorporated under the laws of the state of New York, but not otherwise.* Such corporation must hold a lease of a term of at least one year of the premises in which such match or exhibition is to be held. [Italics ours.]

SEC. 8. Corporations and persons required to procure licenses; professional boxer defined. All corporations, physicians, referees, judges, time-keepers, professional boxers, their managers, trainers and seconds shall be licensed by the said license committee, and no such corporation or person shall be permitted to participate, either directly

or indirectly, in any such boxing or sparring match or exhibition, or the holding thereof, unless such corporation or persons shall have first procured a license from the said license committee. For the purposes of this act, a professional boxer is deemed to be one who competes for a money prize or teaches or pursues or assists in the practice of boxing for a means of obtaining a livelihood or pecuniary gain, and any contest conforming to the rules, regulations and requirements of this act shall be deemed to be a boxing match and not a prize fight.

SEC. 9. Application for license; license committee to furnish list of licensees to commission. Every application for a license shall be in writing, shall be addressed to the license committee, shall be verified by the applicant, and shall set forth such facts as the provisions hereof and the rules and regulations of the committee may require. The license committee shall furnish the commission with the names and addresses of all persons and corporations receiving licenses.

SEC. 10. Subpœnas by boxing commission and license committee; oaths. The boxing commission shall have the authority to issue, under the hand of its chairman, and the seal of the commission, subpœnas for the attendance of witnesses before the commission, to the same effect as if they were issued in an action in the supreme court, and it may, by any member, administer oaths and affirmations and it may examine witnesses in all matters pertaining to the administration of the affairs of the commission; and disobedience of such subpœnas and false swearing before such commission shall be attended with the same consequences and be subject to the same penalties as if such disobedience or false

swearing occurred in an action in the supreme court. Like authority is hereby given to the license committee.

**SEC. 11. Equipment of buildings for exhibitions.** All buildings or structures used or intended to be used for holding or giving such boxing and sparring matches or exhibitions shall be properly ventilated and provided with fire exits and fire escapes, and in all manner conform to the laws, ordinances and regulations pertaining to buildings in the city, town or village where situated.

**SEC. 12. Regulation of conduct of matches or exhibitions.** No boxing or sparring match or exhibition shall be of more than fifteen rounds in length, such rounds to be not more than three minutes each; and no boxer shall be allowed to participate in more than fifteen rounds within twelve consecutive hours. The commission may in respect to any bout or in respect to any class of contestants limit the number of rounds of a bout within the maximum of fifteen rounds. At each boxing or sparring match or exhibition there shall be in attendance a duly licensed referee, who shall direct and control the same. Before starting a contest the referee shall ascertain from each contestant the name of his chief second, and shall hold such chief second responsible for the conduct of his assistant seconds during the progress of the contest. The referee shall have power in his discretion to declare forfeited any prize, remuneration or purse, or any part thereof, belonging to the contestants or one of them, if in his judgment, such contestant or contestants are not honestly competing. There shall also be in attendance two duly licensed judges who shall at the termination of each such boxing or sparring match or exhibition ren-

der their decision. If they are unable to agree, the decision shall be rendered by the referee. Each contestant shall wear, during such contest, gloves weighing not less than five ounces, if such contestant be a light weight or in a class of less weight and six ounces if such contestant be in a class heavier than the light weight class.

SEC. 13. Physician to be in attendance. It shall be the duty of every corporation, at its own expense, to have in attendance at every boxing or sparring match or exhibition, a physician who has had not less than three years' medical practice, whose duty it shall be to observe the physical condition of the boxers and advise the referee or judges with regard thereto.

SEC. 14. Age of participants and spectators. No person under the age of eighteen years shall participate in any boxing or sparring match or exhibition, and no boys under sixteen years of age shall be permitted to attend as spectators.

SEC. 15. Financial interest in boxer prohibited. No corporation shall have, either directly or indirectly, any financial interest in a boxer competing on premises owned or leased by the corporation, or in which such corporation is otherwise interested.

SEC. 16. Sham or collusive exhibitions. Every such corporation and the officers thereof, and any such physician, referee, judge, timekeeper, boxer, manager, trainer, and second, who shall conduct, give, or participate in any sham or collusive boxing or sparring match or exhibition shall be deprived of his license by the commission.

SEC. 17. Revocation or suspension of licenses. Any license herein provided for may be revoked or

suspended by the license committee for the reason therein stated, that the licensee has, in the judgment of the said committee, been guilty of an act detrimental to the interests of boxing.

SEC. 18. Bond. Before a license shall be granted to a corporation, such corporation shall execute and file with the state comptroller a bond in the sum of five thousand dollars, to be approved as to form and sufficiency of sureties thereon by the state comptroller, conditioned for the faithful performance by said corporation of the provisions of this act and the rules and regulations of the commission, and upon the filing and approval of said bond the state comptroller shall issue to said applicant a certificate of such filing and approval, which shall be by said applicant filed in the office of the license committee with its application for license, and no such license shall be issued until such certificate shall be filed. In case of default in such performance, the commission may impose upon the delinquent a penalty in the sum of not more than one thousand dollars for each offense, which may be recovered by the attorney general in the name of the people of the state of New York in the same manner as other penalties are recovered by law; any amount so recovered shall be paid to the state treasurer, as provided in section twenty-nine of this act.

SEC. 19. License fees. Each applicant for a license shall, before a license is issued by the license committee, and annually thereafter during the life of such license, pay to the license committee a license fee, as follows: corporations, in cities of the first class, seven hundred and fifty dollars; in cities of the second class, five hundred dollars; elsewhere, three hundred dollars; physicians, twenty-

five dollars; referees, twenty-five dollars; judges, twenty-five dollars; timekeepers, five dollars; professional boxers, five dollars; managers, twenty-five dollars; trainers, five dollars; seconds, five dollars.

SEC. 20. **Weights; classes and rules.** The weights and classes of boxers and the rules and regulations of boxing shall be the same as the weights and classes and rules and regulations adopted by the Army, Navy and Civilian Board of Boxing Control, Incorporated, and the International Sporting Club of New York, Incorporated.

SEC. 21. **Limitation on difference in weight.** No contest shall be allowed in which the difference in weight of the respective contestants shall exceed eighteen pounds. This provision shall not apply to boxers in the heavy and light-heavy weight classes.

SEC. 22. **Payments not to be made before contests.** No contestant shall be paid for services before the contest, and should it be determined by the judges and referee that such contestant did not give an honest exhibition of his skill, such services shall not be paid for.

SEC. 23. **Examination by physician.** All boxers must be examined by a licensed physician within three hours of his entering the ring.

SEC. 24. **Report of medical examination.** Every corporation shall file with the commission a report of medical examinations not later than twenty-four hours after the termination of a contest.

SEC. 25. **Payments to state.** Every corporation holding any boxing or sparring match or exhibition under this act, for which an admission is charged and received, shall pay to the state treasurer five per centum of the total gross receipts, exclusive of any federal taxes paid thereon. Such payment

shall be made within seventy-two hours after the holding of the contest.

SEC. 26. Tickets to indicate purchase price. All tickets of admission to any such boxing or sparring match or exhibition shall bear clearly upon the face thereof the purchase price of same, and no such tickets shall be sold for more than such price as printed thereon. It shall be unlawful for any such corporation to admit to such contest a number of people greater than the seating capacity of the place where such contest is held.

SEC. 27. Misdemeanor. Any person who directly or indirectly holds any such boxing or sparring match or contest except where all contestants are amateurs without first having procured a license as hereinbefore prescribed shall be guilty of a misdemeanor.

SEC. 28. Certain provisions of penal law inapplicable. The provisions of section seventeen hundred and ten of the penal law shall not apply to any boxing or sparring match or exhibition, conducted, held or given, pursuant to the provisions of this act, nor to any boxing or sparring match or exhibition in which all the contestants are amateurs.

SEC. 29. Appropriation. For the purpose of carrying into effect the provisions of this act for the fiscal year beginning July first, nineteen hundred and twenty, there is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, the sum of forty thousand dollars (\$40,000), or so much thereof as may be necessary. All receipts of the license committee shall be paid over to the state treasurer.

SEC. 30. This act shall take effect immediately.